IN THE

SUPREME COURT OF THE UNITED STATES

September Term, 1972

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No._____

---

STEVEN MODLA, Petitioner,

vs.

SOUTHSIDE HOSPITAL and SCOTTY PARKER, et al,
Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF ARIZONA

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The petitioner, Steven Modla, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered in this proceeding on June 21, 1972.

## OPINION BELOW

The opinions of the Superior Court of Maricopa County, Arizona, the Court of Appeals, Division One for the State of Arizona, and of the Supreme Court of Arizona, such opinions not yet reported, appear in the appendix hereto.

## JURISDICTION

A petition for review was denied by the Supreme Court of Arizona on June 21, 1972, at which date the Clerk entered the denial. This petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3) in that the

petitioner was denied due process of law under the Fourteenth Amendment of the United States Constitution, such denial being shockingly wrong and thereby presenting due process questions to this Court. The order of the Supreme Court of Arizona is dated June 20, 1972. If the 90 days are figured from June 20 this petition may be late. A telegram requesting an extension was sent to the U.S. Supreme Court on September 18, 1972.

QUESTIONS PRESENTED

1. Whether the petitioner's right to counsel was denied by refusing to continue the hearing in Superior Court on the Respondent's Motion for Summary Judgment.

2. Whether due process was denied to the petitioner by the Superior Court not granting his motion for continuance

on the hearing for the Motion for Summary Judgment.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§1257(3) State courts; appeal; certiorari

> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

## STATEMENT OF THE CASE

The petitioner Steven Modla instituted the above entitled and captioned action against the respondent for wrongful discharge from the hospital and slander on April 4, 1969. On or about the 31st day of October, 1969, the respondents moved for Summary Judgment. This motion was argued on December 9, 1969 and the petitioner appeared in propria persona. On or about the 11th day of December, 1969 a formal judgment was entered against the plaintiff. On or about March 25, 1970 the plaintiff's newly acquired attorney filed a motion for review from the final judgment. On or about the 3rd day of June, 1970, plaintiff's attorney James Keppel was allowed to withdraw from the case with the court's and plaintiff's permission. The oral argument on the motion for summary judgment by the respondents was scheduled for July 10, 1970. On

June 22, 1970 petitioner filed a letter with the Court from Dr. Carolyn F. Gerster, M.D., recommending that the petitioner have at least a two week period of rest, whereby the petitioner asked for a continuance for medical reasons and to allow him time to obtain the assistance of counsel. Such motion was denied and the Honorable Marilyn Riddel, Judge of the Superior Court, granted the respondent's motion for summary judgment on the 23rd day of July, 1972. Notice of appeal to the Court of Appeals was filed on September 15, 1970, such appeal affirming the lower court's decision. Petition for review was filed with the Supreme Court of Arizona on the 5th day of May, 1972, such petition being denied on June 1, 1972.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DENIED THE PETITIONER DUE PROCESS

OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Petitioner in this case has been denied the assistance of counsel. During the oral arguments on the respondents' motion for summary judgment on July 10, 1970, the petitioner requested additional time in which to secure the assistance of counsel. Such request was denied. The importance of counsel has been recognized in many criminal prosecutions. In those cases indigent defendants have requested the assistance of counsel though they cannot afford to pay for their services. In the case at bar, the petitioner is more than willing and capable of paying for the services of an attorney. He requested the court give him the additional time to secure the services of an attorney, because he did not feel

that he was capable of handling the complex legal issues which are raised in a motion for summary judgment. His contention that these legal issues were too difficult for him to contend with has been recognized in several cases. In Argersinger v. Hamlin, ____ U.S. ____, 32 L.ED. 530, 92 Sup. Ct. ___(1972), it is stated that the defendant in that case was "unable as a layman to properly raise and present to the trial court good and sufficient defenses." The Court went on to say "that the assistance of counsel is often a requisite to the very existence of a fair trial". (32 L.Ed. at 535) The petitioner in the case at bar feels that his right to be heard and his right to have a fair trial has been denied by his lack of counsel at oral argument for the motion for summary judgment. The case of Powell v. Alabama, 287 U.S. 60 at 68-69 states this proposition clearly:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."

This quotation explains exactly the position of the petitioner.

He pleaded his case when he stated to the court:

"Without being represented by counsel is in itself a flagrant denial of due process of law. I am at this moment desperately seeking an attorney of standing." (Abstract of Record, 146)

Petitioner thereby raised a substantial federal question in the Court below.

2. THE DECISION BELOW DENIED THE PETITIONER DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT HIS MOTION FOR CONTINUANCE WAS DENIED.

On June 22, 1970, the petitioner filed a letter with the court from a certified doctor recommending that Mr. Modla have two weeks rest, such letter constituting on behalf of the petitioner a motion for continuance. By the very nature of the case, that is, wrongful discharge from a hospital, the court was on notice that the petitioner was medically ill. In addition to such medical evidence being submitted the plaintiff in his response to the motion for summary judgment asked the court for a continuance.

"The short period allocated to me by the court to prepare my

briefs for summary judgment against the defendant in my sickness is quite impossible to properly prepare."

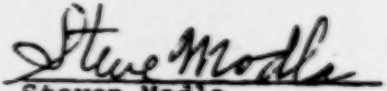
(Abstract of Record, 144)

Such motion was denied. By such denial the petitioner was forced to argue the elements of a motion for summary judgment without preparation and while he was medically ill.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arizona.

Respectfully submitted,



Steven Modla
1060 South Mesa Drive
Mesa, Arizona 85202
In Propria Persona

# APPENDICES

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

| | | |
|---|---|---|
| STEVE MODLA,<br><br>Plaintiff,<br><br>vs.<br><br>SOUTHSIDE HOSPITAL and SCOTTY PARKER, et al,<br><br>Defendant. | ) | Nos. C-221844<br>C-221845<br><br>JUDGMENT |

The defendant SCOTTY PARKER and defendant SOUTHSIDE HOSPITAL in the above captioned consolidated causes filed herein Motion for Summary Judgment pursuant to the provisions of Rule 56, Rules of Civil Procedure, and supporting the same by affidavits, exhibits, reference to the deposition of plaintiff and their memorandum of legal points and authorities, and the matter having been presented to the Court upon oral argument on December 9, 1969, at which time plaintiff was present in person, and

the Court having considered plaintiff's request for a continuance, with oral argument in support of such motion and in opposition thereto, found that plaintiff had more than adequate opportunity to obtain counsel and that his motion for continuance was not well taken; and the Court further found that defendants were entitled to the granting of their Motion for Summary Judgment that plaintiff take nothing by his respective complaints against said defendants. The Court hereafter made and entered a formal written judgment on December 11, 1969, to which reference is hereby made.

Plaintiff thereafter purported to take an appeal from the said judgment, but the same was dismissed April 28, 1970, by the Court upon motion of counsel then appearing for plaintiff. On or about March 25, 1970, plaintiff through his counsel filed a Motion for Relief from Final Judgment, being the aforesaid judgment made,

entered and filed December 11, 1969, to which defendants filed their response after which plaintiff filed a reply and after which other pleadings were filed herein to which reference is hereby made. On May 29, 1970, the Court denied plaintiff's Motion for Relief from Final Judgment, but thereafter the Court, upon its own motion, reconsidered and said motion and on May 25, 1970, made and entered its order vacating the prior order of May 20, 1970, and set aside the judgment entered and filed herein December 11, 1969, and set the hearing on the defendants' Motion for Summary Judgment for oral argument before the Court at a later date.

After a aforesaid order, plaintiff's counsel then of record filed his Request for Leave to Withdraw and after service of such request upon plaintiff, the Court on June 3, 1970, granted such request. The Court by minute entry order permitted additional time to

plaintiff in which to submit opposing memoranda and affidavits. On or about July 2, 1970, plaintiff filed what purported to be his response to the said Motion for Summary Judgment and his Motion for Summary Judgment against defendants.

On July 10, 1970, the matter came on for hearing, plaintiff being present in person and defendants being present by their counsel of record. Upon such hearing the Court considered and rejected plaintiff's Affidavit of Bias and Prejudice filed on July 9, 1970, whereupon extensive argument was heard by the Court and the Motions for Summary Judgment were taken under advisement. The Court, being fully advised, entered its minute entry order on July 20, 1970, again granting defendants' Motion for Summary Judgment that plaintiff take nothing by his respective complaints against said defendants.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff take nothing

against defendant SCOTTY PARKER or against defendant SOUTHSIDE HOSPITAL upon his respective complaints filed against them, and that the Clerk be ordered to enter such judgment against plaintiff and in favor of the said defendants forthwith.

IT IS FURTHER ORDERED that defendants have and recover their taxable costs herein.

DONE IN OPEN COURT this 23rd day of July, 1970.

s/ Marilyn A. Riddel

J U D G E

COPY of the foregoing Judgment mailed this 23rd day of July, 1970, to:

Plaintiff
STEVE MODLA
1060 South Mesa Drive
Mesa, Arizona 85201

s/ Nicholas Udall
Nicholas Udall

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

| | | |
|---|---|---|
| STEVE MODLA, | ) | |
| | ) | |
| Appellant, | ) | 1 CA-CIV 1554 |
| | ) | DEPARTMENT B |
| v. | ) | |
| | ) | MARICOPA County |
| SCOTTY PARKER and | ) | Superior Court |
| SOUTHSIDE HOSPITAL, | ) | Nos. C-221844 and |
| | ) | C-221845 consolidated |
| Appellees. | ) | |
| | ) | ORDER |

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of order together with a copy of the opinion, be sent to each party appearing herein, or the attorney for such party, and to the HONORABLE MARILYN A. RIDDEL, Judge.

DATED this 6th day of April, 1972.

LEVI RAY HAIRE
PRESIDING JUDGE

The foregoing directives
were complied with this 6th
day of April, 1972, by
mailing required to:

Mr. Galen H. Wilkes
Law Offices of Herbert B. Finn
404 United Bank Building
Phoenix, Arizona 85012
Attorneys for Appellant

Mr. Nicholas Udall
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Appellees

The Hon. Marilyn A. Riddel, Judge
Maricopa County Superior Court
Old Courthouse Building
125 West Washington Street
Phoenix, Arizona 85003

CLASSIE GANTT, Clerk
By

_____
Deputy Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

| | | |
|---|---|---|
| STEVE MODLA, Appellant, vs. SCOTTY PARKER and SOUTHSIDE HOSPITAL, Appellees. | ) | 1 CA-CIV 1554 DEPARTMENT B |

Appeal from the Superior Court of Maricopa County ; Cause Nos. C-221845 (Consolidated); The Honorable Marilyn A. Riddel, Presiding

AFFIRMED

---

Herbert B. Finn
By Galen H. Wilkes
Attorneys for Appellant — Phoenix

Jennings, Strouss & Salmon
By Nicholas Udall
Attorneys for Appellees — Phoenix

J A C O B S O N, Judge

The primary questions raised by this appeal deal with the liability of a hospital for discharging a patient and the question of what constitutes slander per se.

On July 15, 1968, plaintiff-appellant, Steve Modla, was admitted as a patient to the Southside Hospital for treatment of lesions on his lips. Almost immediately difficulties arose between appellant and his attending physician. The next day the doctor notified Scotty Parker, a hospital administrator, of his decision to terminate the case and discharge the patient. Later in the day Parker told appellant that the hospital regulations required a patient to have an attending physician responsible for the patient's medical care and treatment, and that since appellant had no attending physician it would be necessary to discharge him. Immediately prior to

the discharge, Parker in the presence of an assistant purportedly said to appellant, "Do me a favor and see a psychiatrist."

Thereafter, appellant filed a complaint against Parker individually, seeking damages for slander in the amount of $272,000. A second complaint was also filed against the hospital seeking damages for its alleged refusal to treat appellant and for wrongfully discharging his from the hospital. As a result of this conduct, appellant allegedly suffered damages in the amount of $750. In addition he prayed for one million dollars in punitive damages against each defendant. Upon motion by appellees both cases were consolidated for trial.

Following the filing of answers, appellees moved for summary judgment, which was granted in December, 1969. The following May, appellant's newly-appointed counsel made a motion for relief from this final judgment.

Initially, the trial court denied the motion but then sua sponte reconsidered said motion, reversed itself, setting aside the December, 1969, judgment. In June, appellant's second attorney was permitted to withdraw. In July, the court granted appellees' second motions for summary judgment. Upon retaining a third attorney, appellant has appealed from these judgments.

Appellees first contend that this appeal must be dismissed because the trial court erred in setting aside the judgment granted to them in December, 1969, from which there was no timely appeal. Under the circumstances set forth in Rule 60(c), Rules of Civil Procedure, 16 A.R.S., it is within the sound discretion of a trial court to set aside a final judgment and that action will not be disturbed on appeal except for clear abuse of discretion. Rule

60(c), Rules of Civil Procedure, 16 A.R.S., Eldridge v. Jagger, 83 Ariz. 150, 317 P.2d 942 (1957). In this case the trial court ruled on appellees' motion for summary judgment the same day they furnished the court with a copy of the hospital records. Rule 56(e), Rules of Civil Procedure, provides in part that "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." In addition, Rule 56(c) requires that "the motion shall be served at least ten days before the time fixed for the hearing." Appellant contends that these rules were not complied with and as a result he did not have sufficient time to reply adequately to the contents of the hospital records.

From a reading of the record we believe that sufficient grounds existed for setting aside the December 1969 judgment, and the trial court did not abuse its discretion in so doing.

As to the merits of the case, appellant contends that the trial court erred in granting summary judgment in favor of defendant Parker, as the statements he allegedly made were slanderous per se and presented a valid jury question as to his special damages. As a general rule, slander per quod is not actionable unless special damages are pleaded and proved. Berg v. Hohenstein, 13 Ariz. App. 583, 479 P.2d 730 (1971). However, slander per se is actionable without a need to plead or prove special damages if the utterance falls within one or more specified categories, damages in such case being assumed.

An oral defamation which concerns one in his profession, trade or business is the category which appellant relies upon in support of his contention that the statement was slanderous per se and therefore a genuine issue of material fact existed for the jury; that is, whether the statement made by Parker in fact

injured appellant's business.

In order to fit within the business category, the slanderous utterance must prejudice the person in the profession, trade or business in which he is actually engaged. This means that the statement must be of or concerning one in his business capacity. See, 53 C.J.S. Libel & Slander § 32-33 (1948) Lady Windsor Hairdressers, Inc. V. Calvo, 35 Misc. 2d 739, 231 N.Y.S.2d 221 (1962). Words which are merely injurious to one regardless of his occupation do not qualify as slander per se. Gunsberg v. Roseland Corp. 34 Misc.2d 220, 225, N.Y.S.2d 1020 (1962). The alleged utterance of Parker "do me a favor, see a psychiatrist," clearly does not pertain to appellant in any business capacity. This being so, it was not slander per se, and appellant was obliged to plead and prove special damages.

When one party moves for summary judgment, the non-moving party "may not rest upon

appellant and that duty was breached when appellant was wrongfully discharged from the hospital before he was cured. In support of the existence of this duty, appellant cites Meiselman v. Crown Heights Hospital, 285 N.Y. 389, 34 N.E.2d 367 (1941) as authority for the proposition that a hospital has a duty not to discharge a patient prematurely and abondon the case. We do not believe Meiselman to be apposite to the facts in this case.

In Meiselman, an eight year old boy who was desperately ill required hospitalization. After a blood transfusion and an operation on both legs, a bone infection set in. The hospital demanded payment from the boy's father, who was unable to pay the bill, so the boy was discharged. The Court, in holding the hospital and physicians liable for the boy's crippled condition, said the jury could have found that the hospital "had prematurely and willfully discharged themselves from attention to the case while the patient

was desperately ill and before he was cured without giving him information or adivce as to subsequent treatment or the desperate and dangerous condition and character of the disease . . ." 34 N.E.2d at 370.

Appellant's reliance on Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N.E.2d 253 (1965) as defining the duty owed by a hospital to its patients is likewise misplaced. In Darling a father sued the hospital and attending physicians for the negligent hospital and medical treatment given to his minor son. After a cast was placed on the boy's leg, gangreme set in which resulted in amputation of the leg. The court held that the hospital had a duty to supervise and review the attending physician's treatment of the patient. As for the breach of that duty, the court said a jury could have

found that the hospital was negligent because of the failure of its nurses to properly observe and report the patient's condition and its own failure to properly review and supervise the care being given by the attending physicians.

The outrageous conduct by the hospitals which gave rise to liability in the two aforementioned cases is entirely absent in the present case. Mr. Modla was admitted for treatment of lesions on his lips. His condition may have been uncomfortable, but helpless he was not. Nor is there any proof or even allegation that the hospital staff did anything to the plaintiff which either actively retarded his treatment or worsened his condition.

A logical extension of appellant's argument highlights the fallacy in his basic premise. Once a hospital has admitted a patient, then in all cases the hospital cannot discharge the patient until he is cured. No

case has been cited which would impose such a duty, nor has this court found such authority on its own research. Not having found that Southside Hospital breached any duty owed to plaintiff, there was no material issue of fact and appellee was entitled to judgment as a matter of law.

Appellant also contends that the trial court failed to rule on his motion to amend the complaint by adding new parties and consequently the judgment appealed from was not final for it adjudged fewer than all of the rights and liabilities of the parties. The argument concludes by stating that the Court of Appeals thereby lacked jurisdiction and the case should be remanded back to superior court for a ruling on the motion.

The answer to appellant's unique argument lies in the effect to be given the failure of the trial court to rule on the motion to amend by adding additional parties. In Col-

boch v. Aviation Credit Corp., 64 Ariz. 88 166 P2d 564 (1946), the court in addressing itself to the failure of the trial judge to rule on defendant's motion for a bill of particularsheld that the trial court's order of judgment may be considered as a denial of the motion. We consider that rule to be applicable on this question and hold that granting of judgment may be considered as a denial of the motion to amend and thus dispositive of the entire argument.

The last contention urged by plaintiff is that the trial court erred in failing to grant him a continuance prior to the hearing on appellees' second motion for summary judgment. The grounds urged at the time of making the motion were that appellant was without counsel and he was ill.

A motion for a continuance is directed to the sound discretion of the trial court predicated on good grounds. Evans v. Lundgren, 11 Ariz. App. 441, 465 P.2d 380 (1970)

motion for summary judgment was originally set for July 10, 1970. On June 3, the court granted appellant's counsel his request for leave to withdraw. In the order appellant consented to and approved of withdrawal of his counsel and expressed a desire to represent himself or obtain other counsel. In addition the order advised appellant of the date set for hearing appellees' motions for summary judgment and appellant acknowledged that he would be prepared for the same. After withdrawal of counsel, the court granted several extensions of time for appellant to submit opposing memoranda with attached affidavits. In view of the fact that appellant created the situation of lack of counsel which he now claims to be prejudicial, we do not find the trial court abused its discretion in denying a continuance on that ground.

In regard to the illness which supposedly prevented appellant from properly preparing

his case, he submitted a letter from a physician who merely "recommended that Mr. Modla have two weeks rest." The motion was properly denied because of the insufficiency of the supporting affidavit. See, 68 A.L.R.2d 470 for a thorough discussion of the factors to be considered in passing upon a motion for continuance on the grounds of illness.

For the foregoing reasons, the judgment is affirmed.

Eino M. Jacobson, Judge

CONCURRING:

Levi Ray Haire, Chief Judge
Division I

William E. Eubank, Judge

SUPREME COURT
STATE OF ARIZONA
Phoenix

June 21, 1972

| | | |
|---|---|---|
| STEVE MODLA, Appellant, vs. SCOTTY PARKER and SOUTHSIDE HOSPITAL, Appellees. | ) | No. 10890-PR (Supreme Court) |
| | ) | No. 1 CA-CIV 1554 (Court of Appeals) |
| | ) | Nos. C-221844 and C-221844 (Consolidated) (Maricopa County) |

The following action was taken by the Supreme Court of the State of Arizona on June 20, 1972, in regard to the above-entitled cause:

"ORDERED: Petition for Review=DENIED."

Record returned to the Court of Appeals, Division One, this 21st day of June, 1972.

CLIFFORD H. WARD, Clerk

By Mary Ann Hopkin

TO: Galen H. Wilkes, Esq., 404 United Bank Building, Phoenix, 85012
Nicholas Udall, Esq., 111 West Monroe Street, Phoenix 85003
Hon. Marilyn A. Riddel, Judge of the Superior Court of Maricopa County, 101 West Jefferson, Phoenix 85003
Clerk, Court of Appeals, Division One, 309 Capitol Bldg., Phoenix 85007
West Publishing Company, 50 W. Kellogg Blvd. St. Paul, Minnesota 55102

COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Mr. Clifford H. Ward, Clerk
Arizona Supreme Court
225 State Capitol Building
Phoenix, Arizona 85007

Dear Mr. Ward:

RE: 1 CA-CIV 1554

MODLA v. PARKER, et al,

MARICOPA County
Superior Court
Nos. C-221844
and C-221845
(Consolidated)

The motion for rehearing was denied on the 2nd day of May, 1972.

A timely petition for review was filed by this Court on the 5th day of May, 1972. Pursuant to the mandate contained in Supreme Court Rule 47 (b), the record is hereby transmitted to your Court, as follows:

1. PETITION FOR REVIEW (7)

2. Order denying motion for rehearing (6);

3. RESPONSE TO MOTION FOR REHEARING (6);

4. MOTION FOR REHEARING (6);

5. ABSTRACT OF RECORD (3);

6. APPELLANT'S OPENING BRIEF (3);

7. APPELLEES' ANSWERING BRIEF (3);

8. APPELLANT'S REPLY BRIEF (3);

9. Documents filed in the Court of Appeals, Division one;

10. Minute Entries;

11. Instruments.

May 15, 1972
Mr. Clifford H. Ward, Clerk

RE: 1 CA-CIV 1554

In the event the Supreme Court accepts the review, we will endeavor to secure and forward the remaining sets of abstract of record and breifs.

Very truly yours,

CLASSIE GANTT, Clerk
By

_____
Deputy Clerk

Enclosures

cc: Mr. Galen H. Wilkes
Mr. Nicholas Udall
The Hon. Marilyn A. Riddel, judge

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 1972, three copies of the Petition for Writ of certiorari were mailed, postage prepaid, to Nicholas Udall, Esq., 111 West Monroe, Phoenix, Arizona 85003, Counsel for Respondents. I further certify that all parties required to be served have been served.

Steven Modla

Steven Modla
1060 South Mesa Drive
Mesa, Arizona 85202
In Propria Persona

SUPREME COURT OF THE UNITED STATES

September Term, 1972

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| | | |
|---|---|---|
| STEVEN MODLA, | ) | |
| | ) | |
| Petitioner, | ) | NO. |
| | ) | |
| vs. | ) | |
| | ) | |
| SOUTHSIDE HOSPITAL and SCOTTY PARKER, et al, | ) | |
| | ) | |
| Respondents. | ) | |
| | ) | |
| | ) | |

To: Nicholas Udall, Esq., Counsel for Respondent

YOU ARE HEREBY NOTIFIED that a petition for a writ of certiorari in the above entitled and numbered case was docketed in the Supreme Court of the United States on the 18th day of September, 1972.

Steve Modla

Steven Modla, Petitioner
1060 South Mesa Dr.
Mesa, Arizona 85202
In Propria Persona

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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-461

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STEVE MODLA,

*Petitioner,*

v.

SOUTHSIDE HOSPITAL and SCOTTY PARKER,

*Respondents.*

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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### Opinions Below

The opinion of the Arizona trial court is not reported in any official publication. A copy of the judgment entered by the Arizona trial court is appended to the petitioner's Petition For Writ of Certiorari. The opinion of the Arizona Court of Appeals is reported at 17 Ariz.App. 54, 495 P.2d 494 (1972). The opinion of the Arizona Supreme Court is not printed in any official publication. A copy of the Arizona Supreme Court's order denying a Petition For Review of the decision of the Arizona Court of Appeals is appended to the petitioner's Petition For Writ of Certiorari.

## Jurisdiction

The respondents disagree with the petitioner's statement as to this Court's jurisdiction. In his jurisdictional statement, the petitioner states that his Petition for certiorari was filed within ninety days of the date upon which the Arizona Supreme Court denied review of the decision of the Arizona Court of Appeals. As a matter of fact, the record will show that the petitioner's Petition For Writ of Certiorari was filed one day late and no proper request for extension of time was filed with or granted by this Court. It is the position of the respondents that the petitioner's failure to timely file his Petition For Writ of Certiorari deprives this Court of jurisdiction to consider this matter.

The Arizona Supreme Court denied the petitioner's request for review of the decision of the Arizona Court of Appeals on June 20, 1972. The petitioner did not file his Petition For Writ of Certiorari with this court until September 19, 1972. Thus, the petitioner's Petition For Writ of Certiorari was not filed with the United States Supreme Court until 91 days after the decision of the Arizona Supreme Court was entered.

The time requirements for the petitioner's attempted Petition For Writ of Certiorari are governed by the Acts of June 25, 1948, c. 646, 62 Stat. 961 and May 24, 1949, c. 139, sec. 106, 63 Stat. 104, 28 U.S.C. sec. 2101, which provides, in pertinent part:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall be taken or applied for within ninety days after the entry of such judgment or decree.* A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days. (Emphasis added).

The procedure for obtaining an extension of time within which to file a Petition For Writ of Certiorari is governed by Rule 22(4) and Rule 34 of the Rules of the Supreme Court of the United

States. Rule 22(4) provides that an application for extension of time within which to file a Petition For Writ of Certiorari must set out the grounds on which jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is deemed justified. Rule 34 provides, in subsection 2, that whenever any justice of this Court or the clerk is empowered to extend the time within which a party may petition for a Writ of Certiorari, an application seeking such extension must be presented to the clerk within the period sought to be extended. Subdivision 2 of Rule 34 further provides that applications for extension of time to file petitions for certiorari shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period.

The petitioner did not file his petition For Writ of Certiorari within the time period provided by law, nor did he properly apply for or obtain an extension of time from this Court in which to file his Petition For Writ of Certiorari. It has long been settled by the decisions of this Court that an application to this Court for a Writ of Certiorari to a state court cannot be entertained if the application is not filed within the statutory time period. *Rust Land & Lumber Co. v. Jackson,* 250 U.S. 71, 39 S.Ct. 424, 63 L.Ed. 850 (1919). The requirement for timely filing a Petition For Writ of Certiorari is jurisdictional. *Toledo Scale Co. v. Computing Scale Co.,* 261 U.S. 399, 43 S.Ct. 458, 67 L.Ed 719 (1923).

Thus, since the petitioner did not timely file his Petition For Writ of Certiorari and did not properly make request for and obtain an extension of time from this Court, he has thereby deprived this Court of jurisdiction to consider the matters attempted to be raised in his Petition For Writ of Certiorari.

In addition, the petitioner states in his jurisdictional statement that this Court's jurisdiction is invoked under 28 U.S.C. §1257(3) in that the petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution. This statement comes as a complete surprise to the respondents.

The respondents are not aware of any Federal constitutional issue having been raised by the petitioner in the courts of the State of Arizona. There were some vague generalizations made by the petitioner in the trial court in the State of Arizona to constitutional rights being infringed. However, the respondents are aware of no references in the trial court record to a claimed Federal constitutional right. When the petitioner filed his appeal with the Arizona Court of Appeals, he made a vague reference to denial of due process of law. The sum total of the ptitioner's alleged raising of a constitutional issue in the Arizona Court of Appeals can be set forth by quoting an issue and argument which he raised in his Opening Brief to the Arizona Court of Appeals at page 38-39, as follows:

> (D) *THE LOWER COURT, THE HONORABLE JUDGE MARILYN A. RIDDELL, ERRED BY NOT GRANTING PLAINTIFF'S MOTION FOR A CONTINUANCE PRIOR TO THE HEARING OF SUMMARY JUDGMENT OF JULY 10, 1970. ON JUNE 3, 1970, PLAINTIFF'S ATTORNEY, JAMES KEPPEL WITDREW LEAVING THE PLAINTIFF WITHOUT AN ATTORNEY.* THROUGHOUT PLAINTIFF'S RESPONSE TO THE MOTION FOR SUMMARY JUDGEMENT, THE PLAINTIFF ASKED THE COURT FOR A CONTINUANCE AND I QUOTE:
>
> "The short period allocated to me by the court to prepare my briefs for summary judgment against defendant in my sickness is quite impossible to properly prepare." (A.R. pg. (144).
>
> "Without being represented by counsel is in itself a flagrant denial of due process of law. I am at this moment desperately seeking an attorney of standing." (A.R. pg. 146).

"As of now my temporary attorney, James Keppel, withdrew because his dad is practicing medicine as a doctor at the Mesa Southside Hospital." (A.R. pg. 146).

On June 22, 1970, plaintiff filed a letter with the court from a Doctor Carolyn F. Gerster, M.D., recommending that Mr. Modla have two weeks rest. Plaintiff submits that the foregoing in effect constituted a motion for a continuance by the plaintiff and that the court under the circumstances erred in not granting plaintiff a continuance until he could obtain counsel to represent himself in the above captioned matter.

As can be seen from reading the above-quoted portion of the Petitioner's Opening Brief on his appeal to the Arizona Court of Appeals, he makes a vague reference to denial of due process of law, but does not specifically base this argument upon the due process clause of the United States Constitution. Nor did he present any authorities to the Arizona Court of Appeals which would support his vague claim of denial of due process of law. For all that appears from the record, it is not known whether the petitioner was basing his due process argument upon the provisions of the Constitution of the United States or whether it was based upon the due process clause of Art. 2, § 3, of the Constitution of the State of Arizona, 1 Arizona Revised Statutes. Additionally, this Court will see from reviewing the judgment of the Arizona trial court, the formal opinion of the Arizona Court of Appeals and the order of the Arizona Supreme Court that none of the Arizona courts ruled upon any Federal constitutional issues. Obviously, the Arizona courts did not deem it necessary to rule upon any Federal constitutional issues because no such issues were properly raised by the petitioner.

It is well settled that the United States Supreme Court will not decide Federal constitutional issues unless the Federal question was raised and decided in the state court below. *Cardinale v. Louisiana,* 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969). When the highest state court has failed to pass upon a Federal question, it will be assumed that the omission was due

to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). It is essential to the Supreme Court's jurisdiction that there be an explicit and timely insistence in the state courts of a Federal constitutional right. *Charleston Federal Savings & Loan Association v. Alderson,* 324 U.S. 182, 65 S.Ct. 624, 89 L.E. 857 (1945), rehearing denied, 324 U.S. 888, 65 S.Ct. 863, 89 L.Ed. 1436 (1945).

In *Thomas v. Iowa,* 209 U.S. 258, 28 S.Ct. 487, 52 L.Ed. 782 (1908), in dismissing a writ of error to the Supreme Court of the State of Iowa for want of jurisdiction, this Court stated:

> The judgment of the state supreme court does not contain the slightest allusion to any Federal question. The chief justice of the state supreme court, after the final judgment in that court, signed a bill of exceptions, which contains the following statement:
>
> 'Under the rules of practice in the supreme court of Iowa no assignment of errors is required or allowed; but the questions made and discussed by counsel on the hearing in the supreme court were such as arise upon the record, the exceptions, and the motion in arrest, and for a new trial, as shown hereinbefore, and, among them, that the court below erred in giving to the jury each of the instructions set out in this bill of exceptions, and numbered, respectively, two, three, four, five, six, and fourteen, and that by said instructions the said district court of Iowa in and for Polk county denied to this plaintiff in error the right of trial by jury, in that the court, by said instructions, determined the degree of the crime of murder of which the jury should find the defendant guilty, if at all, whereas, by the common law and by the express statute of Iowa, the degree of the offense is a matter for the jury to determine, thereby in effect deprived the plaintiff in error of *his liberty without due process of law.* (Emphasis by the Court.)
>
> 'That, upon the trial and hearing of the case in the supreme court of Iowa, the parties, respectively, to wit, the state of

Iowa and also the defendant and appellant, Charles Thomas, by their respective counsel, submitted arguments, both in print and orally, wherein they discussed the questions aforesaid, and all others arising upon the record.'

The Federal question, if it can be found in the record at all, must be found in this statement. It is too late to raise it for the first time in the petition for a writ of error from this court or in the assignments of error here. Montata ex rel. Haire v. Rice, 204 U.S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281. All that appears in the statement is that exceptions were taken to certain parts of the charge to the jury, because they "in effect deprived the plaintiff in error of his liberty without due process of law;' and that the question thus raised was discussed before the supreme court of the state. But something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the state courts to give us the limited authority to review their judgments which exists under the Constitution and is regulated by § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). A mere claim in the court below that there has been a denial of due process of law does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment to the Constitution. . . . (P. 488 of 28 S.Ct.)

And, in ***Kipley v. People of Illinois,*** 170 U.S. 182, 18 S.Ct. 550, 42 L.Ed. 998 (1898), in dismissing a writ of error to the Supreme Court of the State of Illinois to challenge the constitutionality of an Illinois statute, this Court stated:

> We are of opinion that this court is without jurisdiction to review the final judgment of the supreme court of Illinois in these cases. The answer makes no reference whatever to the constitution or laws of the United States. It is true that it avers that the Illinois civil service act was 'unconstitutional and void.' But when the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a state, of some title, right, privilege, or immunity secured by the constitution or laws of the United States, it must appear, expressly or by necessary intendment, from the record, that

such right, title, privilege, or immunity was 'specially set up or claimed' under such constitution or laws. Rev. St. p. 709. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a federal right. Oxley Stave Co. v. Butler Co., 166 U.S. 648, 17 Sup. Ct. 708; Levy v. Superior Court, 167 U.S. 175, 177, 17 Sup. Ct. 769. The averment in the answer that the statute of Illinois was unconstitutional and void must be taken as intended to apply to the constitution of that state, and not to the constitution of the United States. . . . (Pp. 551-552 of 18 S.Ct.)

Applying the above-stated law to the case presently before this Court, it is respectfully submitted that the petitioner has failed to properly invoke the jurisdiction of this Court by his Petition For Writ of Certiorari in that the Petition For Writ of Certiorari was not timely filed and the petitioner did not raise or preserve a Federal constitutional issue in the courts of the State of Arizona. Therefore, it is respectfully submitted that this Court does not have jurisdiction of the petitioner's attempted Petition for Writ of Certiorari and that this Court should dismiss the petitioner's Petition For Writ of Certiorari for want of jurisidction.

## Question Presented for Review

Assuming for the purposes of argument only that the petitioner has properly invoked the jurisdiction of this Court, then the question presented to this Court can be set forth as follows:

Whether the petitioner was denied due process of law and right to counsel under the United States Constitution when the trial judge in the Arizona Superior Court denied the petitioner a continuance on the respondents' Motion For Summary Judgment.

## Statement of the Case

The respondents do not believe that the petitioner's statement of the case properly sets forth the background necessary for a determination of the question presented for review. Therefore the respondents will restate the case. Respondents have been advised

by the Arizona Court of Appeals that the record before the Arizona Court of Appeals has been transmitted to the United States Supreme Court. The official record of the case before the Arizona Court of Appeals is contained in the Abstract of Record filed in the Arizona Court of Appeals. In the respondents' statement of the case, reference will be made to the Abstract of Record which was filed in the Arizona Court of Appeals, and the Abstract of Record will be referred to as "A.R." followed by the appropriate page number.

The petitioner, STEVE MODLA, instituted an action in the Superior Court of the State of Arizona in and for the County of Maricopa against SOUTHSIDE HOSPITAL and John Does I through X by filing a Complaint on April 7, 1969 (A.R. 1-5). The Complaint alleged a claim for medical malpractice and was filed for MR. MODLA by his attorney, Robert J. Grygiel. Petitioner filed another Complaint in the Superior Court of the State of Arizona in and for the County of Maricopa on April 7, 1969, against SCOTTY PARKER (A.R. 6-10). This Complaint alleged a claim for slander. This Complaint was also filed for MR. MODLA by his then attorney, Robert J. Grygiel.

The respondent, SCOTTY PARKER, filed an Answer to the petitioner's Complaint on April 30, 1969 (A.R. 11-14). An Answer was filed on behalf of the respondent, SOUTHSIDE HOSPITAL, also on April 30, 1969 (A.R. 15-19).

On May 6, 1969, and May 9, 1969, the petitioner's original counsel, Mr. Grygiel, withdrew as counsel on both cases with the consent of the petitioner (A.R. 22-24 and A.R. 25-27).

On May 21, 1969, counsel for the respondents moved to consolidate the two actions which had been filed by the petitioner (A.R. 28-31). A hearing was held on the Motion to Consolidate on June 25, 1969. The trial court granted the Motion to Consolidate and earnestly suggested to the petitioner that he secure counsel to represent him (A.R. 36). After being advised by the

trial judge that he should secure counsel, the petitioner, STEVE MODLA, made a statement to the court to which the court replied. This colloquy between the petitioner and the trial judge was as follows:

> Mr. Modla: I cannot afford, in as much as I have an appeal to the Justice Department of the United States, whereas I have had discrimination by doctors, I feel that I have defended myself mercilessly against vicious attacks and I can't afford a continuation of attorney fees. That is my ardent plea, that you will accept me as I am, man to man, without any hidden book closets. My expression of the right to defend myself.
>
> I would thank you for any—
>
> The Court: No, Mr. Modla, you overlook the fact this is not defending yourself, you are going forward in a lawsuit, you are the plaintiff and therefore you need someone to go forward. It isn't a matter of you defending yourself, it's a matter of going forward (A.R. 37).

Again, at the same hearing on June 25, 1969, the trial judge and counsel for the respondents, Mr. Salmon, attempted to suggest to the petitioner that he should have counsel to represent him, and this conversation occurred as follows:

> The Court: Well, now, for example, you were at the deposition—I took the trouble to read the file—You were at a deposition and you are now in a position where the other attorneys can move to dismiss your lawsuit, so the Court is just going to suggest to you again that if you are interested in handling this lawsuit that you secure an attorney, or you are just going to have problems. And, I think for your own peace of mind you ought to have some advice, some advice of a lawyer, if you want to. You are the plaintiff, it's now—If you were defending an action, I would see where there would be come (sic) possibility that a Court might be able to let a layman defend himself and have some semblance of fair play, but where the burden is on you to go forward with the evidence, and that is your burden, you have said this man did you wrong, you have said this hospital did you wrong, the burden is on you.

You are just about like — You or I being in the operating room with somebody who is a brick layer going to operate on us. We just don't know what we are doing, see? So, the Court is just going to suggest to you again that if you are interested in the lawsuit, that you had better secure some legal help. Find.

Mr. Salmon: If it please the Court —

The Court: Yes?

Mr. Salmon: Perhaps if we point out to Mr. Modla, maybe Lawyers Referral, or Legal Aid could help him (A.R. 39-40).

Thereafter, on October 31, 1969, the respondents filed a Motion For Summary Judgment (A.R. 42-70). Over a month later, on December 5, 1969, petitioner filed a document with the new trial judge with a plea that a continuance be granted so that he could seek counsel (A.R. 71). The trial judge treated the document as a Motion For Continuance.

Petitioner appeared on his own behalf for the oral argument on the Motion For Summary Judgment, which occurred on December 9, 1969.

The Motion For Summary Judgment was granted and a formal Judgment recited that the court had considered the petitioner's request for a continuance with oral argument in support of the Motion and in opposition thereto, and the court found that the petitioner had had more than adequate opportunity to obtain counsel and that his Motion For Continuance was not well taken (A.R. 74-75).

The petitioner then attempted to file a Notice of Appeal to the Arizona Court of Appeals from the Judgment entered by the trial court on December 11, 1969. The petitioner failed to properly perfect his appeal. Thereafter, on February 26, 1970, petitioner filed a Motion For Rehearing of the granting of Summary Judgment (A.R. 79-80). Again, on March 25, 1970, the petitioner appeared by and through counsel, James H. Keppel, and

filed a Motion For Relief From Final Judgment pertaining to the Judgment entered on December 11, 1969 (A.R. 84-85). The petitioner's Motion was granted on May 25, 1970, and the Judgment was set aside (A.R. 183).

On May 26, 1970, petitioner's new counsel, James H. Keppel, filed a Motion For Leave to Withdraw as Counsel of Record for the reason that the petitioner had refused to abide by advice given by counsel and the petitioner had indicated the desire to represent himself in any further proceedings, thereby rendering ineffectual the attorney-client relationship. Thereafter, on June 2, 1970, James H. Keppel filed another request for leave to withdraw as counsel of record for the reason that the petitioner had indicated a desire to represent himself in any further proceeding. Attached to this request for leave to withdraw was a consent of the petitioner in which the petitioner stated that he consented to and approved of the withdrawal of James H. Keppel as his attorney of record for the reason that the petitioner desired to represent himself in any further proceeding or retain other counsel. This request to withdraw as counsel was approved by the court and a formal Order was signed by a judge of the Maricopa County Superior Court on June 3, 1970. (These motions to withdraw and the Order of the Court were not contained in the Abstract of Record on Appeal, however, they are in the original Superior Court record.)

On June 4, 1970, a judge of the Maricopa County Superior Court granted the petitioner until June 15, 1970, in which to submit opposing memorandum with attached Affidavits in opposition to the respondents' Motion For Summary Judgment. On or about June 22, 1970, the petitioner filed a letter with the court from a Dr. Carolyn F. Gerstes, M.D., in which the doctor recommended that MR. MODLA have two weeks' rest. Finally, on July 2, 1970, the petitioner filed a response to the Motion For Summary Judgment and the petitioner, himself, moved for Summary Judgment. The matter was orally argued to the trial

court on July 10, 1970. The trial court granted the respondents' Motion For Summary Judgment, and a formal Judgment was approved by the trial judge on July 23, 1970 (A.R. 185). Thereafter, the petitioner obtained new counsel and filed a Notice of Appeal to the Arizona Court of Appeals on September 15, 1970 (A.R. 186).

The Court of Appeals of the State of Arizona rendered its opinion on April 6, 1972. This opinion is found at 17 Ariz.App. 54, 495 P.2d 494. A Motion For Rehearing was denied by the Arizona Court of Appeals on May 2, 1972. Thereafter, the petitioner petitioned the Arizona Supreme Court to review the decision of the Arizona Court of Appeals. Review was denied by the Arizona Supreme Court on June 20, 1972, and formal notice of the denial was given on June 21, 1972.

## Reasons for Denying the Writ

The Petition For Writ of Certiorari should be denied for two separate and independently sufficient reasons:

(1) As has been previously argued in the jurisdictional statement set forth above, the petitioner has failed to properly invoke this Court's jurisdiction, and the Writ should be denied by this Court for lack of jurisdiction.

(2) Assuming for the purposes of argument only that the petitioner has properly invoked this Court's jurisdiction, the Writ should still be denied since the Arizona state courts have not decided any Federal question of substance that has not heretofore been determined by this Court, nor have the state courts decided any Federal question in a way not in accord with applicable decisions of this Court.

## Argument

The essence of petitioner's Petition For Writ of Certiorari is that he has been denied due process of law and right to counsel in violation of the United States Constitution since the trial court

did not grant him a continuance in order that he might obtain assistance of counsel to oppose the respondents' Motion For Summary Judgment.

It is well settled by the decisions of this Court that, if in any case, civil or criminal, a state or Federal court were *arbitrarily* to refuse to hear a party by counsel, employed and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Reynolds v. Cochran*, 365 U.S. 525, 81 S.Ct. 723, 5 L.Ed.2d 754 (1961). Even in criminal cases, this rule has been construed to mean that a defendant should be afforded a *fair* opportunity to secure counsel of his own choice. *Powell v. State of Alabama, supra.*

There can be little doubt but that the petitioner in the present case was afforded more than an adequate and fair opportunity to obtain counsel to represent him. The record reflects that the petitioner was represented twice by counsel before the last hearing on the Motion For Summary Judgment and that he was urged by the court and by respondents' attorney to employ other counsel. He ignored this advice and chose to represent himself each time up until the last minute, when it was time to argue the Motion For Summary Judgment. Each time the Motion For Summary Judgment was set for argument, the petitioner would appear and contend that he was sick and without counsel and that he was being deprived of his right to counsel. The most succinct response which can be made to the petitioner's argument that he was denied due process of law and right to counsel is found in the language of the Arizona Court of Appeals wherein the Court stated:

> The last contention urged by plaintiff is that the trial court erred in failing to grant him a continuance prior to the hearing on appellees' second motion for summary judgment. The grounds urged at the time of making the motion were that appellant was without counsel and he was ill.

A motion for a continuance is directed to the sound discretion of the trial court predicated on good grounds. Evans v. Lundgren, 11 Ariz.App. 441, 465 P.2d 380 (1970). The motion for summary judgment was originally set for July 10, 1970. On June 3, the court granted appellants' counsel his request for leave to withdraw. In the order appellant consented to and approved of withdrawal of his counsel and expressed a desire to represent himself or obtain other counsel. In addition the order advised appellant of the date set for hearing appellees' motions for summary judgment and appellant acknowledged that he would be prepared for the same. After withdrawal of counsel, the court granted several extensions of time for appellant to submit opposing memoranda with attached affidavits. *In view of the fact that appellant created the situation of lack of counsel which he now claims to be prejudicial, we do not find the trial court abused its discretion in denying a continuance on that ground.*

In regard to the illness which supposedly prevented appellant from properly preparing his case, he submitted a letter from a physician who merely 'recommended that Mr. Modla have two weeks rest.' The motion was properly denied because of the insufficiency of the supporting affidavit. SEE, 68 A.L.R. 2d 470 for a thorough discussion of the factors to be considered in passing upon a motion for continuance on the grounds of illness. (Emphasis added.) (P. 498 of 495 P.2d)

## Conclusion

The petitioner has failed to properly invoke the jurisdiction of this Court to grant a Writ of Certiorari to the Supreme Court of the State of Arizona. In addition, the petitioner has not shown in any way whatsoever that the Arizona state courts have decided a Federal question of substance not heretofore determined by this Court, nor has he shown where the state courts have, in any manner, decided a Federal question in a way not in accord with applicable decisions of this Court. It is therefore respectfully submitted that the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

JENNINGS, STROUSS & SALMON

By NICHOLAS UDALL

Nicholas Udall
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Respondents

## Certificate of Service

I, NICHOLAS UDALL, a member of the Bar of the United States Supreme Court, do hereby certify that on the 12 day of October, 1972, three (3) copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona were served by mail, by depositing the same in a United States Post Office in Phoenix, Arizona, with first class postage prepaid, addressed to:

Steve Modla
1060 South Mesa Drive
Mesa, Arizona 85202

petitioner in propria persona. I further certify that all parties required to be served have been served. I further certify that service has been made in accordance with Rule 33(1) and Rule 33(3)(b) of the Rules of the Supreme Court of the United States.

NICHOLAS UDALL

Nicholas Udall

JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

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No. 72-461

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STEVE MODLA, Petitioner,

vs.

SOUTHSIDE HOSPITAL and SCOTTY PARKER,
Respondents.

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ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF ARIZONA

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# PETITIONER'S REPLY MEMORANDUM

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Steve Modla
1060 South Mesa Drive
Mesa, Arizona 85202
In Propria Persona

## JURISDICTION

### I. TIMELINESS OF PETITION

Respondents contend that this applicant's Petition for Certiorari was not filed timely. It should be noted that this petitioner placed a telephone call to the Clerk of the United States Supreme Court on September 18, 1972, requesting information as to the procedure for obtaining an extension for the filing of a petition in this matter. Petitioner was informed by the Clerk that if a telegram was sent from Arizona by the petitioner so that it would arrive in Washington D.C. before midnight on the 18th day of September, 1972, that when the petition arrived it would be considered timely. Pursuant

to the instructions of the Clerk of the Court, petitioner placed a telegram with Western Union Telegraph Company at 12:25 P.M. Phoenix time. Western Union's records show that such telegram was sent from Phoenix over the wires at 12:39 P.M., 14 minutes after the message was received from Mr. Modla.

Due to some mechanical mistake on the part of Western Union, the telegram arrived 8 1/2 hours later or at 11:57 P.M. in Washington, D.C. The telegram had specific instructions that it was to be delivered to the Supreme Court immediately. However, it was not delivered until 8:40 A.M. on the morning of September 19, 1972. It should be noted that the petition which was mailed

September 18, 1972 was received by the Supreme Court and docketed as of September 19, 1972. The request for the extension of time and the pertinent facts have been set forth in a petition to Justice William O. Douglas. As of the time of the filing of this Reply Memorandum, Justice Douglas has not ruled on the matter of the petitioner's request for an extension of time.

Petitioner submits that he followed the instructions of the Clerk of the United States Supreme Court explicitly when he placed a telegram with Western Union Telegraph Company. Only due to mechanical difficulties of Western Union did the telegram not arrive

on time. Therefore, petitioner prays that since he complied with all of the rules in reference to obtaining an extension of time, that his Petition for Certiorari be accepted as timely.

II. FEDERAL QUESTIONS RAISED BELOW

Petitioner has raised many times the federal questions involved in this matter in the Superior Court hearings, the Court of Appeals and the Supreme Court of the State of Arizona. The federal questions were raised as to the lack of counsel and the denial of the motion for continuance of hearing.

"Without being represented by counsel is in itself a flagrant denial of due

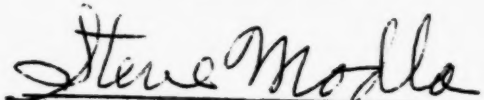
process of law. I am at this moment desperately seeking an attorney of standing." [AR, pg. 146]

"The short period allocated to me by the Court to prepare my brief for summary judgment against the defendants in my sickness is quite impossible to properly prepare." [AR, pg. 144]

Even if the federal issues had not been raised in this case, the denials of counsel and of the motion for continuance were such flagrant violations of due process that the Court should act "sua sponte". The importance of counsel has already been made apparent in the petitioner's

original Petition for Certiorari. The Court, realizing such issues, should not base its decision in this matter on the fact that the lower courts have failed to rule on these issues. The petitioner herein is entitled to the federal due process of law which has been denied him by the courts below.

Respectfully submitted,



Steve Modla
1060 South Mesa Drive
Mesa, Arizona 85202
In Propria Persona

Two copies of the foregoing
mailed this 30 day of
November, 1972, to:

Nicholas Udall
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Respondents

Kathy Cipperly